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No. 487

In the

Supreme Court of the United States

October Term, 1958

Walter Filipek,

Petitioner,

—against—

Moore-McCormack Lines, Inc.,

Respondent.

—and—

Eastern Rigging Corp.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	12

INDEX TO APPENDIX

PAGE

Opinion of United States Court of Appeals for the Second Circuit 13

Judgment of Court of Appeals for the Second Circuit 24

CASES CITED:

Anderson, Adm'x v. Atlantic Coast Line R. Co., 350 U. S. 807 11

Arnold v. Panhandle & Santa Fe Ry. Co., 353 U. S. 360 11

Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52 7

Bruszewski v. Isthmian S.S. Co., 163 Fed. (2) 720 cert. den. 333 U. S. 828 ..... 3, 9

Byars v. Moore-McCormack Lines, Inc., 155 Fed. (2) 587 ..... 3, 9

Cahill v. New York, N. H. & H. R. Co., 350 U. S. 898 .. 11

Deen v. Gulf, Colorado & Santa Fe Ry. Co., 353 U. S. 925 11

Ferguson v. Moore-McCormack Lines, 352 U. S. 521 11

Futrelle, Adm'x v. Atlantic Coast Line R. Co., 353 U. S. 920 11

Gibson v. Thompson, Trustee, 355 U. S. 18 10

Gindville v. American Hawaiian Steamship Co., 224 Fed. (2) 746 9

Halecki v. United New York and New Jersey Sandy Hook Pilots Assn., 251 Fed. (2) 708 ..... 3, 8, 9

	PAGE
Herdman v. Pennsylvania R. Co., 352 U. S. 518	11
Honeycutt v. Wabash Ry. Co., 355 U. S. 424	10
McBride v. Toledo Terminal R. Co., 354 U. S. 517	11
O'Neill v. Baltimore & Ohio R. Co., 348 U. S. 956	11
Palermo v. Luckenbach S.S. Co., 2 Cir., 246 F. 2d 557, reversed 355 U. S. 20	10
Pope & Talbot, Inc. v. Hawn, 346 U. S. 406	7
Ringhiser v. Chesapeake & Ohio Ry. Co., 354 U. S. 901	11
Rogers v. Missouri Pac. R. Co., 352 U. S. 500	11
Shaw, Ex'r v. Atlantic Coast Line R. Co., 353 U. S. 920	11
Smalls v. Atlantic Coast Line R. Co., 348 U. S. 946	11
Stinson, Adm'x v. Atlantic Coast Line R. Co., 355 U. S. 62	10
Stone v. New York, Chicago & St. Louis R. Co., 344 U. S. 407	11
Strickland v. Seaboard Air Line R. Co., 350 U. S. 893	11
Thomson v. Texas & Pac. Ry. Co., 353 U. S. 926	11
Webb v. Illinois Cent. R. Co., 352 U. S. 512	11
Wilkerson v. McCarthy, 336 U. S. 53	11

STATUTE:

Title 28 U. S. C. A. Section 1254(1)	2

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WALTER FILIPEK,

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MOORE-McCORMACK LINES, INC.,

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EASTERN RIGGING CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Walter Filipek, prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed August 11, 1958 affirming a final judgment entered in the United States District Court for the Eastern District of New York on December 4, 1957 on the opinion of Bruchhausen, J., setting aside a jury verdict of $47,500 for the petitioner in an action for damages for personal in-

juries and entering a judgment for respondent, Moore McCormack Lines, Inc., notwithstanding the verdict and in the alternative granting a new trial conditioned upon such determination as might be made on appeal, and dismissing the complaint.

Citations to Opinions Below

The opinion of the Court of Appeals for the Second Circuit with a dissenting opinion by Chief Judge Clark, which appears on pages 8a through 18a of volume II of the record herein, and which is made a part of the appendix to this petition and printed *infra* on pages 13-23, is not yet officially reported.

The opinion of the District Court by Bruchhausen, *J.*, granting respondent Moore McCormack Lines, Inc.'s motion for an order setting aside the jury's verdict is reported in 156 Fed. Supp. 854. It also appears on pages 39a through 45a of volume I of the record herein.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the Provisions of Title 28 U. S. C. A. Section 1254(1). The judgment of the Court of Appeals for the Second Circuit, affirming the judgment entered notwithstanding the verdict and dismissing the complaint was entered August 11, 1958, the appeal having been argued May 14, 1958; Lumbard, *C.J.* and Swan, *C.J.* for affirmance. Clark, *Chief Judge* wrote a dissenting opinion for reversal and remand for the reinstatement of the verdict.

Questions Presented

Does the opinion of the Court below unduly confine the doctrine of *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Assn.*, 251 Fed. (2) 708, cert. granted June 9, 1958, and improperly limit the scope of the shipowner's duty to furnish a reasonably safe place to a business visitor?

Does the Opinion of the Court below erroneously expand the doctrine of *Bruszewski* v. *Isthmian S.S. Co.*, 163 Fed. (2) 720, cert. den. 333 U. S. 828, and *Byars* v. *Moore McCormack Lines, Inc.*, 155 Fed. (2) 587, so as to deny recovery for negligence to a business visitor testing but not repairing ship's gear, and who is injured while exposed to risks merely collateral to the work but not inherent in it?

Have the principles relating to litigants' rights to jury determination of factual issues, as announced in numerous decisions of this Honorable Court, been observed by the Court below?

Should not certiorari be granted in the exercise of this Honorable Court's power to supervise the judiciary and to prevent usurpation of the traditional function of the jury especially where, as here, the dissenting opinion of the Chief Judge of the Court below, expresses repeated concern over " • • • a growing judicial tendency to invade the province of the jury"?

Statement of the Case

The within action was originally brought at law with a jury demand, on April 20, 1953, alleging a cause of action against the respondent shipowner growing out of personal injuries sustained by the petitioner aboard the S.S. "Mormacsurf" on or about the 23rd day of December, 1952. Recovery was sought on the grounds both of negligence and unseaworthiness.

The shipowner impleaded the petitioner's employer, an independent contractor. In view of the disposition of the action between the petitioner and the shipowner, we shall not hereinafter refer to that phase of the case which relates to matters as between the shipowner and the impleaded independent contractor.

The basis of federal jurisdiction below is diversity of citizenship between the parties and the requisite amount in controversy.

In brief, the shipowner had made a contract with Eastern Rigging Corp., petitioner's employer, to perform certain services aboard the vessel and petitioner was engaged in work contemplated by the contract at the time he was injured.

On the date of the accident and for some time prior thereto, the vessel was in Hoboken, N. J. being prepared for Canadian trade. One of the requirements was that booms and other running gear be tested for capacity by petitioner's employer and be stamped by a representative of the American Bureau of Shipping certifying to the tested capacity.

At the moment of the accident two gangs were working, one gang at Hatch #1, one gang at Hatch #2. The gang at Hatch #1 was actually engaged in testing a boom thereat. Petitioner was with various co-employees at Hatch #2, aiding in lowering a boom preparatory to its being tested.

As the gang at Hatch #1 was applying pressure on the winch cable measured by a scale, the king post securing the boom broke off at a point about 8 feet above the deck and fell towards Hatch #2 where the petitioner was working as aforesaid.

As the king post from Hatch #1 was thus falling towards them, the members of the gang at #2 Hatch, including petitioner, momentarily lost control of the boom they were lowering and petitioner was seriously injured by appurtenances of the aforesaid boom as they whipped about the deck.

The jury returned a general verdict for petitioner in the amount of $47,500. In answering various special interrogatories, the jury stated, *inter alia,* that the shipowner was negligent and that such negligence was the proximate cause of petitioner's injuries.

The jury likewise answered various special interrogatories relating to unseaworthiness. We do not consider these pertinent with respect to this petition and shall not discuss them further inasmuch as it is our contention that the verdict based on the theory of negligence is amply supported and should not have been disturbed.

We quote briefly from the dissenting opinion of Judge Clark as to various aspects of the proof as to negligence. Judge Clark said in part (p. 16a, Vol. II of the record herein, p. 21 *infra,* of the appendix herein): "At trial plaintiff introduced evidence that the space plate on the king post was of an inferior type, that rust spots were found on the king post after the accident, and that three months prior to the accident Weber, a seaman aboard defendant's ship, heard a cracking in the king post when another piece of equipment, a runner, employed in the operation of the boom, fouled during operation. This evidence is sufficient to support a finding that the defendant had at least constructive notice of some sort of defect in the king post."

We point out additionally that the record shows the work could have been done differently from the way in which it was performed with the test going on at Hatch

#1 simultaneously with the preparatory work at Hatch #2. In other words, the test at Hatch #1 could have been performed while preparatory work progressed at Hatch #5, a great distance away where there would be no danger if anything went wrong at Hatch #1 (Transcript of Farrell testimony, p. 13a of petitioner's appendix below).

There is ample testimony that the third mate and chief electrician of the vessel were present at the time of the accident. The record also shows that no warning was given to petitioner or his employer or co-workers, nor were they even told about the fouling of the runner above referred to. There was also in evidence a log entry made some three months prior to the accident herein referring to the stranding and breaking of the runner.

Other evidence supporting the jury's finding of negligence is not lacking. Finally we point out that at pages 380 and 381 of the transcript of trial testimony, the attorney for the shipowner stipulated that he "* * * makes no contention that the manner in which the boom test was performed by the Eastern Rigging Corporation or the manner in which they performed the work of testing the boom at the #1 port forward boom, had anything whatever to do with the breaking of the king post at the #1 port forward boom."

Respondent Moore-McCormack Lines, Inc., moved to set the jury's verdict aside and also moved for judgment in its favor notwithstanding the verdict. The District Court granted the shipowner's motion for a directed verdict and judgment was thereafter entered accordingly on December 4, 1957.

Thereafter petitioner appealed from the order and judgment aforesaid and the Court of Appeals for the Second Circuit affirmed the judgment below on August 11, 1958.

Reasons for Granting the Writ

1. The question presented is important as affecting the rights and liabilities of many people in a far-flung industry which is affected with public interest.

2. The decision below erroneously invades the province of the jury as the finder of the facts, contrary to principles enunciated by this Honorable Court.

3. The decision below appears to conflict in principle with another recent decision in the same Court of Appeals and with a decision of the Court of Appeals of another Circuit.

4. The decision below is erroneous.

Since the shipping industry is undoubtedly one of the most important industries in this country, as it has always been, and directly involves many people as well as domestic and foreign economic and other factors, it is clearly in the public interest that the rights and liabilities of persons engaged in activities related to the shipping business should be fixed and determined.

This Honorable Court has itself often recognized the importance of adjusting relations in this field.

Moreover, considering that it has been established at least since the decision in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, if not earlier in *Atlantic Transport Co. of West Virginia* v. *Imbrovek*, 234 U. S. 52, that Federal maritime law governs in situations such as the case at bar, uniformity is of maximum significance.

The Court below cites no case in this Honorable Court squarely deciding the issue raised.

The majority opinion below states in part at page 13a of Vol. II of the record, page 19 *infra*, of the appendix

herein, "Nor is there any merit to the claim that Moore-McCormack failed to see that the work was conducted in a safe manner. The defendant, having hired Eastern to test the booms (admittedly a hazardous task), was under no duty to protect the plaintiff from risks inherent in such testing. Bruszewski v. Isthmian S.S. Co., supra."

It is noteworthy that the opinion below does not even refer (in connection with the claim of negligence) to the case of *Halecki* v. *United N. Y. and N. J. Sandy Hook Pilots Assn., supra,* wherein this very Court had stated on page 711, "The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.' Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the 'methods and manner' of its use were proper."

Thus the Court of Appeals for the Second Circuit, itself, has recently held that there is a duty to provide a business visitor with a reasonably safe place wherein to work and that this duty persists during the time in which the independent contractor carries on his activities and includes the duty to use reasonable care to ascertain the methods and manner in which the independent contractor carries on his activities. Certainly in the *Halecki* case, *supra,* a situation was presented in which it might be said more truly than in the case at bar, that the work itself created the danger;

yet the Court held in that case that the shipowner was required to furnish a safe place to work but held otherwise in the case at bar.

The *Halecki* case is now before this Honorable Court, a petition for writ of certiorari having been granted on the 9th day of June, 1958.

In the case at bar, the dangers were not necessarily inherent in the work as pointed out above and could have been avoided in various ways adverted to in the discussion of the evidence contained above. No warning was given to the petitioner of any dangers or defects such as might have arisen from the fouling of the runner; nor was the petitioner aboard to perform repairs; nor was the petitioner in the position of one to whom a known defective condition was held out as unsafe and unseaworthy with instructions to render it safe.

Under such circumstances, the reason for the rule of the *Byars* and *Bruszewski* cases above cited does not obtain. Indeed, in the case of *Gindville* v. *American Hawaiian Steamship Co.*, 224 Fed. (2) 745, the Court of Appeals for the Third Circuit says on page 747 that the meaning of the *Bruszewski* case is quite narrow. The Court states, "It (the *Bruszewski* case, *supra*) means no more than if a carpenter is called in to repair a hole in a roof he cannot complain that a roof with a hole in it is an unsafe place to work."

In the case at bar, the petitioner does not complain of the dangers inherent in testing booms; he complains of the defendant's negligence, amply supported by the evidence, in failing to give him or his employer proper warnings and failing to use reasonable care to ascertain the method and manner in which the work was carried on and in failing to provide the king post with adequate support rather than with an inferior type of space plate and com-

plains of other matters hereinabove referred to, none of which were inherent in the work. Nor did the work itself create the dangers of which the petitioner complains.

Not only is the decision below erroneous for the above reasons, but the majority opinion overlooks the growing body of authoritative pronouncements of this Honorable Court as to the proper function of the jury on the one hand and the judiciary on the other.

The majority opinion arrogates unto the Court the weighing and determination of factual issues and the inferences to be drawn therefrom. The majority opinion goes so far as to refer to issues of credibility.

This Honorable Court itself has often recognized under such circumstances that it should exercise its power to properly supervise the judiciary and correct usurpation of the jury's function.

In this case, we alone do not say this; but Chief Judge Clark in his dissenting opinion writes at page 17a of Vol. II of the record, printed *infra*, at page 22 of the appendix, "I shall not repeat at length the concern I have previously voiced at what seems to me a growing judicial tendency to invade the province of the jury. See Palermo v. Luckenbach S.S. Co., 2 Cir., 246 F. 2d 557, 561-563, reversed 355 U. S. 20, with the verdict eventually reinstated, 2 Cir., 253 F. 2d 734; Kermarec v. Compagnie Generale Transatlantique, 2 Cir., 245 F. 2d 175, 183, certiorari granted 355 U. S. 902. But the vast number of cases where the Supreme Court has had to intervene in recent years to restore verdicts judicially scuttled should be recalled."

Judge Clark then goes on to cite the following cases: *Palermo* v. *Luckenbach S.S. Co., supra; Honeycutt* v. *Wabash Ry. Co.*, 355 U. S. 424; *Stinson, Adm'x* v. *Atlantic Coast Line R. Co.*, 355 U. S. 62; *Gibson* v. *Thompson, Trustee*, 355 U. S. 18; *Ringhiser* v. *Chesapeake & Ohio Ry.*

Co., 354 U. S. 901; *McBride* v. *Toledo Terminal R. Co.*, 354 U. S. 517; *Thomson* v. *Texas & Pac. Ry. Co.*, 353 U. S. 926; *Deen* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 353 U. S. 925; *Futrelle, Adm'x* v. *Atlantic Coast Line R. Co.*, 353 U. S. 920; *Shaw, Ex'r* v. *Atlantic Coast Line R. Co.*, 353 U. S. 920; *Arnold* v. *Panhandle & Santa Fe Ry. Co.*, 353 U. S. 360; *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500; *Webb* v. *Illinois Cent. R. Co.*, 352 U. S. 512; *Herdman* v. *Pennsylvania R. Co.*, 352 U. S. 518; *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521; *Cahill* v. *New York, N. H. & H. R. Co.*, 350 U. S. 898; *Strickland* v. *Seaboard Air Line R. Co.*, 350 U. S. 893; *Anderson, Adm'x* v. *Atlantic Coast Line R. Co.*, 350 U. S. 807; *O'Neill* v. *Baltimore & Ohio R. Co.*, 348 U. S. 956; *Smalls* v. *Atlantic Coast Line R. Co.*, 348 U. S. 946; *Stone* v. *New York, Chicago & St. Louis R. Co.*, 344 U. S. 407; *Wilkerson* v. *McCarthy*, 336 U. S. 53.

In the case at bar, as clearly as in any case cited above, has the Court below "judicially scuttled" the verdict. Adherence to the principles of uniformity and fairness dictates that in this instance the province of the jury should be recognized and its determination followed.

We perceive no reason why the following language of this Court in *Rogers* v. *Missouri Pacific Railrd. Co.*, 352 U. S. 500 is not clearly applicable here. At page 510 the Court states, "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state Courts persistently deprive litigants of their right to a jury determination."

It would be manifestly unfair to grant petitions for writ of certiorari only in cases arising under particular statutes where issues such as those herein arise. This Honorable Court has not so confined its grant of certiorari to such cases; for example, the recent case of *Palermo* v. *Luckenbach, supra.*

Nothing in particular statutes requires this Honorable Court to exercise its function of preventing the judiciary from invading the province of the jury in cases arising thereunder to a greater extent than in cases where the fact finding function is given to the jury pursuant to the provisions of the Seventh Amendment to the Constitution and the common law tradition surrounding it.

CONCLUSION

Important questions of substantive federal law pertaining to an industry of great economic and social significance are here presented. Likewise, are presented questions concerning litigants' rights generally to trial by jury, and the proper sphere of jury and judicial functions.

On the basis of the authorities and for the reasons above set forth, and because of the conflicts of authority hereinabove referred to and the errors of the Court below, it is submitted that the decision below should be reversed, and the cause remanded for the reinstatement of the jury's verdict, or any other relief which this Honorable Court deems just and proper.

Wherefore, petitioner respectfully prays that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER FILIPEK
Petitioner

By: JAMES W. FORSYTH
Attorney

JACK STEINMAN
On Petition

Dated: New York, N. Y.
October, 1958

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 374—October Term, 1957.

(Argued May 14, 1958 Decided August 11, 1958.)

Docket No. 25096

WALTER FILIPEK,

Plaintiff-Appellant,

—v.—

MOORE-McCORMACK LINES, INC.,

Defendant and Third Party Plaintiff-Appellee,

—and—

EASTERN RIGGING CORP.,

Third Party Defendant-Appellant.

Before:

CLARK, *Chief Judge,*
SWAN and LUMBARD, *Circuit Judges.*

Appeal from an order of Walter Bruchhausen, *Judge,* Eastern District of New York, 156 F. Supp. 854, setting

aside a $47,500 jury verdict for the plaintiff in an action for personal injuries, and entering a judgment for the defendant, Moore-McCormack Lines, Inc. n.o.v. or in the alternative granting a new trial. The third party defendant also appeals from so much of the order entered by the district court which dismissed the third party complaint without prejudice. Affirmed.

JAMES W. FORSYTH, New York, N. Y. (Jack Steinman, New York, N. Y., on the brief), *for plaintiff-appellant.*

WALTER X. CONNOR, New York, N. Y. (Charles N. Fiddler, Thomas F. Feeney, and Kirlin, Campbell & Keating, New York, N. Y., on the brief); *for defendant and third party plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Lawless & Lynch and Purdy, Lamb & Catoggio, New York, N. Y., on the brief), *for third party defendant-appellant.*

LUMBARD, *Circuit Judge*:

This is an appeal from an order of Judge Bruchhausen, Eastern District of New York, 156 F. Supp. 854, setting aside a jury verdict for the plaintiff, Walter Filipek, in the amount of $47,500 and entering judgment n.o.v. for the defendant, Moore-McCormack Lines, Inc., or in the alternative granting a new trial. The third party defendant also appeals from so much of the order which dismissed the third party complaint without prejudice.

Filipek, a ship's rigger and boom tester, sued to recover for injuries sustained on December 23, 1952 while he was working on the defendant's vessel, the S. S. Mormacsurf.

Two theories of recovery were advanced by the plaintiff, namely that the injuries were caused by the unseaworthiness of the ship and that the injuries were due to the negligence of the defendant, Moore-McCormack Lines, Inc. The shipowner impleaded as third party defendant Eastern Rigging Corp., the plaintiff's employer, upon the theory of implied indemnity.[1]

In December 1952 Moore-McCormack was engaged in outfitting the S. S. Mormacsurf for the Canadian trade. Under §§466 to 470 of the Canadian Shipping Act of 1934 (Revised Statutes of Canada [1952] Chapter 29, §§471 to 475, Vol. 1), for the protection of workers in the Canadian trade, a shipowner is required to have "the strength of machinery tackle and gear" employed in the loading and unloading of the ship tested and the tests certified by competent persons such as a representative of the American Bureau of Shipping. The plaintiff concedes that the Bureau will not certify safe working loads unless tests are made by skilled specialists, rather than by crew members. Included in the machinery to be tested were the kingposts, the booms, and all the appurtenances thereto. The kingposts are stationary vertical masts, from which extend steel cables or runners attached to the movable booms or poles. These booms or poles are capable of being lowered from an upright to an oblique or horizontal position by means of the cable running from the winches.

Moore-McCormack engaged the plaintiff's employer, Eastern Rigging, to conduct these tests of the S. S. Mormacsurf's equipment. On the day of the accident Eastern sent a crew of ten men aboard the ship to conduct the tests. The ten men were divided into two work gangs. The first

[1] While the jury found for Eastern as between it and Moore-McCormack, in answer to five special questions, in view of our disposition of the appeal it is unnecessary to refer to the third party phases of the case.

gang, which included Filipek, immediately set about lowering the booms at Hatch No. 5 in the aft part of the ship to the desired angle for testing. They then prepared the booms at the No. 1 Hatch for testing and had started work at the No. 2 Hatch. In the meantime the second gang had completed the required testing of the machinery at the No. 5 Hatch. They then moved forward to the No. 1 Hatch and during the course of the testing there, when some 14,000 pounds pressure was brought to bear on the boom, the kingpost snapped and broke off about eight feet above the deck and toppled in the direction of Hatch No. 2.

At the time the plaintiff was taking the kinks out of the topping cable attached to the boom at the No. 2 Hatch. He was not struck by the falling kingpost but when it fell the members of the plaintiff's gang ran from their posts and gave up control of the topping cable which, on being released, whipped across the deck, wrapped around the plaintiff's leg, and caused the injuries for which he seeks recovery.

The unseaworthiness claim may be disposed of briefly. The jury found, in answer to Special Interrogatory 5, that Moore-McCormack did not warrant the seaworthiness of the kingpost with respect to Filipek. The plaintiff now argues that this finding of the jury should be disregarded on the ground that the question should not have been propounded to the jury; and further that there was ample basis to support the jury's findings, in answer to interrogatories 3 and 4, that the ship was unseaworthy and that such unseaworthiness was the proximate cause of Filipek's injuries. We see no merit in this contention.

The plaintiff made no objection to the submission of interrogatory 5 to the jury and he will not now be heard to complain. Cf. Rule 51, Federal Rules of Civil Procedure, 28 U. S. C. A.; *Adams v. Southern Bell Telephone & Telegraph Co.*, 295 Fed. 586 (4 Cir. 1924).

In any event, the plaintiff did not warrant the seaworthiness of the vessel to Filipek. The doctrine of seaworthiness extends only to members of the ship's crew and to those, such as longshoremen, who do work traditionally done by members of the crew. See *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 (2 Cir. 1958), cert. den. May 19, 1958; *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association*, 251 F. 2d 708 (2 Cir. 1958), cert. granted June 9, 1958. Here the plaintiff's work was not that of a member of the crew. The Canadian law required that the testing be done by an outside expert who was not attached to the ship. It could not have been done by crew members; the American Bureau of Shipping would not have issued a certificate approving the tests if conducted by any member of the defendant's crew. See 46 U. S. C. A. §§881 and 369 and Coast Guard Regulations, 46 C. F. R. 90.35, 91.25-25 and 92.01.

We turn then to the main issue before us, namely, whether there was evidence sufficient to support the jury's findings that Moore-McCormack was negligent and that its negligence was the proximate cause of plaintiff's injuries, and their award of $47,500 damages.

First the plaintiff asserts that Moore-McCormack was negligent as it was chargeable with knowledge of the latent defect in No. 1 port forward kingpost which caused it to break and that it failed to advise the riggers of this defect. He points to the deposition of John Weber, a former seaman who had worked aboard the vessel, that in September 1952, over two months prior to Filipek's injury, the runner had fouled on the deck and that at that time Weber heard a cracking in the kingpost by the No. 1 Hatch. The fact that a runner broke three months previously is confirmed by a notation to that effect in the log book of the Mormacsurf signed by the Chief Officer, but that notation does not refer to any cracking in the

kingpost. Indeed, Weber admitted that he did not tell anyone of the incident until he related it to the plaintiff's attorney after the institution of this suit and some four and one-half years after the occurrence. Any knowledge on the part of Weber cannot be imputed to the Mormacsurf as he was not in Moore-McCormack's employ on September 9, the date of the alleged cracking of the kingpost. According to Weber's deposition he had left the ship the day before and just returned to pick up his sea chest and pay some debts. His relation to the ship at the time of the alleged cracking in the kingpost was that of a mere stranger. Admittedly a visual inspection of the kingpost itself would not disclose whether or not any damage had occurred to the kingpost as a result of this incident.

The only other evidence which bears on Filipek's related claim that Moore-McCormack failed to provide a safe place to work is the testimony of two of the plaintiff's co-workers that after the kingpost broke on December 23, 1952 they noticed some dark spots thereon which might have been rust. There is no evidence that this "rust" was visible prior to the accident or that the defendant knew or should have known of its existence at that time.

Thus, while it is true that there may have been some latent or hidden defect in the kingpost, there is no evidence that the defendant had any knowledge or notice of such a defect. Clearly the shipowner is not liable for injuries caused by "a latent defect that a reasonable inspection by the shipowner or his agents would not show." *Wholey* v. *British & Foreign S.S. Co.*, 158 Fed. 379, 380 (E. D. N. Y. 1908), aff'd 171 Fed. 399 (2 Cir. 1909). See *Cannella* v. *Lykes Bros. S.S. Co.*, 174 F. 2d 794 (2 Cir. 1949), cert. den. 338 U. S. 859; *Bruszewski* v. *Isthmian S.S. Co.*, 163 F. 2d 720 (3 Cir. 1947), cert. den. 333 U. S. 828; *Jensen* v. *Bank Line*, 26 F. 2d 173 (9 Cir. 1928).

Nor is there any merit to the claim that Moore-McCormack failed to see that the work was conducted in a safe manner. The defendant, having hired Eastern to test the booms (admittedly a hazardous task), was under no duty to protect the plaintiff from risks inherent in such testing. *Bruszewski* v. *Isthmian S.S. Co., supra.* The rule creating the duty to furnish a safe place to work does not apply where the prosecution of the work itself makes the place and creates the danger. As this Court said in *Byars* v. *Moore-McCormack Lines,* 155 F. 2d 587, 588 (2 Cir. 1946): "The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place, when the very work in which the servant is engaged makes it unsafe."

The plaintiff also claims that the "space plate," which is a kind of brace on the kingpost, rendered the kingpost unsafe. In an attempt to prove this he called as a witness Captain Philip E. Shaw, a marine consultant who testified that the use of such a "space plate," welded as it was, tended to concentrate the stresses in the steel and that it was his "personal preference * * * to put a clamp there in agreement with the American Bureau of Shipping, and tie the clamp to the bulkhead instead of stiffening up this whole area." The mere fact that a "space plate" was used did not render the place unsafe. That an expert has a personal preference for a certain type device does not mean that the use of other equipment constitutes a breach of the duty to use due care.

It is likewise clear that the plaintiff's charge that the defendant was negligent in failing to see that work was done safely is without merit. While certain of the ship's officers were present during the testing of the equipment, it is apparent that they were there not to direct the work or to participate in it in any way, but merely as observers. The work of Filipek and the other Eastern employees was

actually supervised by Eastern's foremen. No orders were in fact given by any of the ship's officers. The mere presence of some of the ship's officers placed no duty on Moore-McCormack to see that the work was being done in a safe manner by Eastern's employees. *Gallagher* v. *United States Lines*, 206 F. 2d 177 (2 Cir. 1953), cert. den. 346 U. S. 897; *Berti* v. *Compagnie De Navigation Cyprien Fabre*, 213 F. 2d 397 (2 Cir. 1954).

There was no evidence to support the verdict of the jury and Judge Bruchhausen's order setting the verdict aside and directing entry of judgment for Moore-McCormack was quite proper. Thus it is unnecessary for us to pass on the appeal of Eastern, the third party defendant, as there is no question of Eastern's liability over to Moore-McCormack.

Affirmed.

CLARK, *Chief Judge* (dissenting):

The majority opinion herewith, perhaps taking its cue from plaintiff's brief and argument, makes this case appear quite complex. But to me it seems a simple one where the jury, after full proof and appropriate charge, has performed its historic function of rendering its verdict. If sustained on the evidence, that should stand, even though we may not like it.

The court charged the jury that it must find that defendant had notice of a defect in the boom and/or king post in order to find the defendant negligent. The jury, in answer to a special interrogatory, found that the defendant was negligent. Hence, in the jury's eyes, defendant must have had actual or constructive notice of the defect. If this finding is supported by the evidence the verdict must stand, for, as the majority implicitly concedes, it is not unreasonable for the jury to conclude that defendant's failure

to warn plaintiff's employer of a known defect is negligence proximately related to plaintiff's injury. See *Corrado* v. *Pennsylvania R. Co.*, 2 Cir., 171 F. 2d 73, certiorari denied 336 U. S. 919; *Bruszewski* v. *Isthmian S. S. Co.*, 3 Cir., 163 F. 2d 720, certiorari denied 333 U. S. 828; *Jensen* v. *Bank Line*, 9 Cir., 26 F. 2d 173.

At trial plaintiff introduced evidence that the space plate on the king post was of an inferior type, that rust spots were found on the king post after the accident, and that three months prior to the accident Weber, a seaman aboard defendant's ship, heard a cracking in the king post when another piece of equipment, a runner, employed in the operation of the boom, fouled during operation. This evidence is sufficient to support a finding that the defendant had at least constructive notice of some sort of defect in the king post.

The compelling strength of Weber's testimony in this respect is attested by the manner in which the court below and the majority here seek to avoid it. Judge Bruchhausen, noting that Weber had not mentioned the matter to anyone previous to his consultation with plaintiff's attorney after the accident and that the boom and king post were in normal use for three months after the alleged cracking was heard, chose not to believe the witness. D. C. E. D. N. Y., 156 F. Supp. 854, 857-858. While the trial judge has a large area of discretion in entering a judgment n.o.v., matters of credibility are always within the province of the jury. So the opinion herewith takes a different tack to steer around Weber's testimony. It summarily disregards the evidence as irrelevant because "Any knowledge on the part of Weber cannot be imputed to the Mormacsurf." True, Weber had been discharged on September 8, the day before the cracking incident, and had returned to the ship on September 9 just to pick up his gear. But the question is not whether Weber informed the Mormacsurf's officers of what

he observed. It is whether defendant's employees in the course of their employment learned of the defect. Weber testified that there were several of defendant's employees standing and working near him when the incident occurred. Surely it is not unreasonable for a jury to find that if Weber heard the king post crack, defendant's employees did also, so that their knowledge is properly imputable to the employer. Moreover, it is not admitted, as the majority states, that a visual inspection of the king post would not have disclosed its defect. And Weber's testimony strengthens the inference drawn from the presence of rust spots on the post after the accident that the defect in the king post was discoverable by inspection.

I shall not repeat at length the concern I have previously voiced at what seems to me a growing judicial tendency to invade the province of the jury. See *Palermo* v. *Luckenbach S. S. Co.*, 2 Cir., 246 F. 2d 557, 561-563, reversed 355 U. S. 20, with the verdict eventually reinstated, 2 Cir., 253 F. 2d 724; *Kermarec* v. *Compagnie Generale Transatlantique*, 2 Cir., 245 F. 2d 175, 183, certiorari granted 355 U. S. 902. But the vast number of cases where the Supreme Court has had to intervene in recent years to restore verdicts judicially scuttled should be recalled. See *Palermo* v. *Luckenbach S. S. Co., supra*, 355 U. S. 20; *Honeycutt* v. *Wabash Ry. Co.*, 355 U. S. 424; *Stinson, Adm'x* v. *Atlantic Coast Line R. Co.*, 355 U. S. 62; *Gibson* v. *Thompson, Trustee*, 355 U. S. 18; *Ringhiser* v. *Chesapeake & Ohio Ry. Co.*, 354 U. S. 901; *McBride* v. *Toledo Terminal R. Co.*, 354 U. S. 517; *Thomson* v. *Texas & Pac. Ry. Co.*, 353 U. S. 926; *Deen* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 353 U. S. 925; *Futrelle, Adm'x* v. *Atlantic Coast Line R. Co.*, 353 U. S. 920; *Shaw, Ex'r* v. *Atlantic Coast Line R. Co.*, 353 U. S. 920; *Arnold* v. *Panhandle & Santa Fe Ry. Co.*, 353 U. S. 360; *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500; *Webb* v. *Illinois Cent. R. Co.*, 352 U. S. 512; *Herdman* v. *Pennsyl-*

vania R. Co., 352 U. S. 518; *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521; *Cahill* v. *New York, N. H. & H. R. Co.*, 350 U. S. 898; *Strickland* v. *Seaboard Air Line R. Co.*, 350 U. S. 893; *Anderson, Adm'x* v. *Atlantic Coast Line R. Co.*, 350 U. S. 807; *O'Neill* v. *Baltimore & Ohio R. Co.*, 348 U. S. 956; *Smalls* v. *Atlantic Coast Line R. Co.*, 348 U. S. 946; *Stone* v. *New York, Chicago & St. Louis R. Co.*, 344 U. S. 407; *Wilkerson* v. *McCarthy*, 336 U. S. 53.

I would reverse and remand for the reinstatement of the verdict.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of August one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge.

HON. THOMAS W. SWAN,
HON. J. EDWARD LUMBARD,
Circuit Judges.

WALTER FILIPEK,
Plaintiff-Appellant.

—v.—

MOORE-McCORMACK LINES INC.,
Defendant and Third Party Plaintiff-Appellee.

EASTERN RIGGING CORPORATION,
Third Party Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to defendant-third party Plaintiff-Appellee, Moore-McCormack Lines, Inc.

A. DANIEL FUSARO
Clerk